SINURI BIN TUBAR & ANOR. v. SYARIKAT EAST JOHORE SAWMILLS SDN. BHD.

[O.C.J. (Shankar J.) April 6, 1986]

[Johore Bahru – Civil Suit No. 259 of 1981]

Tort – Negligence – Child injured in timber yard – Claim for damages – Whether timber yard was an allurement – Duty of occupiers to trespassers especially children.

The defendants had a sawmill at the 4½ milestone Jalan Scudai-Air Hitam road on its western side. At the rear of the sawmill was a bathroom. For the water-starved inhabitants of the nearby kampong, this plentiful supply of water in the sawmill bathroom was a permanent attraction. If and when they could get to it baths could be had free of charge.

On the day of the accident, the infant plaintiff had gone to the sawmill bathroom together with his two brothers. Here they had bathed and it was on the return home that the tragedy occurred.

The infant plaintiff, who was 11 years at the time of the accident, was seriously injured while he was crossing the yard on his way home. His hand was trapped under the logs and had to be amputated. He was left with a stump just above the right wrist. The plaintiff claimed damages for the injuries he received at the defendant's sawmill.

Held, dismissing the plaintiff's claim: (1) whether an object should be considered an allurement must of course be a question of fact to be decided on the circumstances of each case. Timber logs in a private yard could not be considered an allurement. The idea of pleading allurement in the circumstances of the case was wholly misconceived;

(2) the absence of evidence about any similar incident in the sawmill must lead to the inference that the plaintiff's case was a rare and unfortunate exception;

(3) no adverse findings against the defendants could be made in this case which would have the consequence of imposing some pecuniary liability upon them for the very serious injury which the plaintiff sustained in this tragic accident.

Observation: "Human calls of nature do not wait for Government to function. Clean water is a birthright of every human-being as much as clean air. The court was informed that sometime after the accident water supply has now been arranged for into this Kampong. It is a pity that it was not provided earlier."

Cases referred to:

(1) *Phipps* v. *Rochester Corporation* [1955] 1 Q.B. 450.
(2) *Morley* v. *Staffordshire County Council* [1939] 4 All E.R. 92.
(3) *British Railways Board* v. *Herrington* [1972] A.C. 877.
(4) *Lembaga Letrik Negara* v. *D. Ramakrishnan* [1982] 2 M.L.J. 128.

CIVIL SUIT.

Ong Pek Ha (Mrs.) for the plaintiff.
L. Parthiban (*Yong Yee Yen* with him) for the defendants.

Cur. Adv. Vult.

Shankar J. : This is a claim for damages for personal injuries sustained by the infant plaintiff at the defendants' sawmill on November 29, 1980.

The sawmill is located at the 4½ milestone Jalan Scudai-Air Hitam road on its western side. The front of the sawmill faces the road. The back of the sawmill abuts the Johore Straits. Between the rear of the sawmill building and the water's edge was a logging yard. For some years prior to the accident and at all material times, the defendants continued a practice of bringing their logs in through the front entrance and then unloading them in the yard. This location was subject to the influence of the tides. At high tide the water would come into the yard and cause the logs to float. When the water receded, the logs would settle down but in no particular order. Wet logs are said to saw more easily. But the practice resulted in the ground between the logs becoming extremely soggy. The logs would also be wet and slippery and on occasions also be unstable.

Along its northern boundary there was a squatter settlement called Kampong Scudai Kiri. The inhabitants had no piped water in the settlement. River water was available aplenty from a muddy tributary which seems to have run somewhere between Kampong Scudai Kiri and the sawmill. This tributary as it approached the river's edge became something of a swamp. For clean fresh pipe water, the Kampong inhabitants had to proceed to a Caltex Station beside the main Scudai road. But the problem here was that the water had to be paid for. The other source of water was a bathroom at the rear of the sawmill. This case centers around that alternative source.

The bathroom was nearer the southern boundary well away from the Kampong. It was meant for the use of the workers in the sawmill. The tap water here was trapped in a tank. For the water-starved inhabitants of the kampong, this plentiful supply of water in the sawmill bathroom was a permanent attraction. If and when they could get to it baths could be had free of charge.

But the sawmill owners had not given any

express permission to the Kampong inhabitants to use their bathroom. On the contrary there is evidence that a fence had been erected along the northern boundary of the sawmill to separate it from the kampong. This fence was constructed by lining up used band saws one on top of the other and nailing them into intermittent wooden poles. At the front of the sawmill warning signs were posted prohibiting unauthorised entry. These were both in Malay and in English. In addition there was a guard at the entrance to the sawmill. But at the rear of the sawmill as one approached the water's edge on the northern side, some problems appear to have been caused by the swampy ground. Access could be gained into the sawmill through this swamp, but only by ways known to the Kampong inhabitants themselves.

At the time of the accident which is the subject matter of this claim, the plaintiff was only aged eleven. When he gave evidence at this trial, he was 16. He said that early in the morning on the day in question, he had gone to the sawmill bathroom together with his two younger brothers, Johari then aged six and Buhari then aged nine. Here they had bathed and it was on the return home that the tragedy occurred.

Because the ground was soggy and they did not want to get their feet dirty, the boys walked along the top of the logs hopping from one to the other where necessary. Buhari had gone out in front. Next followed Johari almost immediately in front of the plaintiff. As they neared the place of the tragedy, plaintiff says that there was one log lying transversely across the log on which he was then perched. On the log in front onto which he needed to step to carry on with his journey lay another log also at an angle to it. When Johari stepped on to the log in front the balance of the logs became unstable and it looked as though he was going to fall between the logs with the transverse log in front rolling backwards onto him.

The plaintiff says that on seeing this he went to the aid of his brother and as he did so the transverse log on the log on which he was then standing also rolled towards him from the back. Johari managed to duck out of danger and sustained some slight bruises only. The plaintiff, however, got his right hand trapped under one of the logs and it was badly crushed. It had to be amputated a few days later and he was left with a stump just above the right wrist. It is the claim of the plaintiff that he was never forbidden to use the sawmill bathroom. He says that he went there for a bath about twice or three times a week. He claims that he could visit the bathroom at any time of his choosing without let or hindrance. It was put to him that the security guards employed by the sawmill had in fact chased him out of the sawmill several times but he denied this. It was also put to him that one of the sawmill employees namely Inche Rosli bin Bakar, whom he knew well, had not only pointed out that the plaintiff was forbidden to use the sawmill bathroom but had also advised the plaintiff and the plaintiff's father of the dangers in doing so. The plaintiff was confronted with this individual in the course of his cross-examination. He denied that any such prohibition or advice had ever been given.

Despite his claims to the contrary I hold that it must have been apparent to him that since these logs floated with the tide and settled thereafter, it would be a risky business for them to walk on the logs because they could be wet, slippery and unstable. But his claim was that from the Kampong and through the rear of the sawmill there was no other way to get to the bathroom.

The plaintiff's father was present in Court throughout. He was a party to the action as the plaintiff's next friend. It had been put to the plaintiff in cross-examination that his father had also been advised not to allow his children into the sawmill compound. The man who claimed to have done this on behalf of the sawmill owners was actually brought into Court face to face with the plaintiff and his father. But despite all this the plaintiff's father was not called to testify.

Instead the plaintiff called an ex-employee of the sawmill at or about the material times. This man is a friend of the plaintiff's family. He also lives in the Kampong. He claimed that the prohibition, if there was one, against outsiders using the sawmill bathroom had never been enforced. Consequently he and others in the Kampong had freely got to the sawmill bathroom by using a shortcut from the Kampong through the rear of the sawmill across the logging yard.

However, he admitted that it was a risky business for persons to trip across the logs. And he also admitted that once the sawmill commenced operation at or about 7 a.m. the winches would have come into operation to drag the logs from the yard into the sawmill. This kind of movement within the yard would have put any use of the logs as a thoroughfare from the Kampong to the bathroom completely out of the question. The sawmill ceased operations daily at 9.00 p.m. Then the

workmen who lived outside would go home. A few of them lived in the sawmill and their living quarters were in the sawmill compound near the southern boundary.

At the time when he gave evidence, this witness was serving a prison sentence for theft. By itself this fact was neither here nor there. However there was a strong probability of bias since he had come from the same Kampong as the plaintiff and his family knew them very well. However, he was unable to give any material evidence on how the accident occurred or even what happened shortly thereafter even though he must have been in the sawmill at that time if indeed he was then working there.

This evidence came from another witness called by the plaintiff. She was Akiah bte. Mahmood. This lady lives in the Kampong adjacent to the sawmill. She heard the plaintiff's screams and appears to have been able to get across from the Kampong into the edge of the sawmill compound on her side without undue difficulty. Here she saw the plaintiff approaching her with his right hand absolutely crushed. The plaintiff was then about to faint. She rendered first aid and arranged for him to be sent to hospital.

I found her to be a truthful witness. She claimed to have used the sawmill bathroom at the material time on occasion but at night when there were not many people about. She readily admitted that this was done, "To save money." The Caltex people charged for the water they supplied. The sawmill water was used by the Kampong dwellers free of charge. In a nutshell, what this euphemism amounted to, was that the absence of clean water in the Kampong had forced the Kampong dwellers to commit theft.

The defendants called the Manager of the sawmill. He had been there for some years previously. He gave an account of a running battle to keep the unwelcome intruders from the kampong out of the sawmill. He complained that every time the fence was repaired, holes would be made in it for entry from the Kampong side. He said that thefts had occurred not only of the taps in the bathrooms, but also of wood from the sawmill and batteries from lorries. He said that members of the security staff had been assaulted when trying to prevent unauthorised intrusions. Police reports had been made and these had not been completely effective. What emerged from his evidence was that it should have been common knowledge amongst the Kampong dwellers that they were not welcome in the sawmill and that it was not the intention of the sawmill either actively or passively to provide the Kampong dwellers with a free supply of water.

Mr Kernail Singh was the defendants' head of security. He supervised a team of men who together with him provided a round-the-clock security service for the sawmill. He has personal knowledge of having chased the Kampong children from the sawmill back into the Kampong. It seems that they did not exercise their right of pursuit because these children knew their way across the swamp and onto the other side. But not the security staff. Considering that he was talking of events over a period of a number of years, the proper inference from his evidence was that incursions by the Kampong children were not uncommon and that when they happened to the knowledge of the security staff, measures would be taken to have them ejected. So far as the bathroom was concerned, attempts to keep it locked had failed because these locks would be broken or stolen.

The most important witness for the defence was Inche Rosli bin Bakar. He lived in the workers' quarters at the back of the sawmill with his wife and children. He had instructed these children not to venture into the logging yard and he had consequently not had any problems with them. He has categorically stated that about the material time when this accident happened, he had in fact warned the plaintiff that he should not come into the sawmill through the logging yard and that he should not use the sawmill bathroom which was only meant for the sawmill workers. This witness has gone further to say that he knew both the plaintiff and his father and that he had also had occasion to go to the plaintiff's father's house to advise him of the perils of allowing his children to make the trip to the sawmill bathroom.

Having heard both sides, it is the view of this Court that the situation here was one where the sawmill owners had taken all the steps which they thought were open to them to prevent the Kampong dwellers from coming into their compound to use their bathrooms. However, these measures had not proved to be totally ineffective. Outside of working hours intrusions still occurred and it is not irrelevant that on the day in question the plaintiff got into the sawmill bathroom undetected in the early hours of the morning when there were no sawmill workers about. I reject the plaintiff's evidence that he was free to go into the sawmill at any time he pleased.

It is now necessary for me to say something about the law relating to parental control, allurement and the duty owed by the occupiers of premises to others, especially children, who may be trespassing therein.

Phipps v. *Rochester Corporation*[1] was a case concerning parental responsibility for children who live near places to which it is not safe for them to go. Devlin J. said (at page 472):

"But the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied, are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land."

In *Morley* v. *Staffordshire County Council*[2] it was held that a stack of steel lattices on a road was not an allurement or a trap to children so as to impose liability on the occupier. Is a stack of timber logs in the private yard of the sawmill any different?

In *Charlesworth* on Negligence – 5th Edn. para 356 it is stated that:

"However, an object should not be considered an allurement unless the temptation which it presents is such that no normal child could be expressed to restrain himself from inter-meddling, even if he knows that to inter-meddle is wrong. Therefore where a child who was stealing a ride on a low-loader passing through a town at walking pace was killed when attempting to jump off, it was held that the vehicle was not an allurement. An allurement might either tempt children to come upon premises where they were not permitted to be, so that they were trespassers, or it might tempt children invited or licensed to be on the premises to meddle with the allurement."

Whether an object should be considered an allurement must of course be a question of fact to be decided on the circumstances of each case. I do not consider that timber logs in a private yard could be considered an allurement. Inche Rosli's children and the children of the other workers in the sawmill who lived right next to the logging yard do not appear to have considered the logs such an irresistible temptation as to want to inter-meddle with them. The matter, however, does not end there. Notwithstanding the averrment in the statement of claim that these logs constituted objects which children could play with, there was not a shred of evidence even from the plaintiff himself that the logs had been used in this way. This was a case where the bathers from the Kampong used the logs to get to and from the sawmill bathroom because they did not want to get their feet muddied in the soggy ground between the logs in the yard. The front entrance was barred to them. The backdoor route thus became a way of necessity. The idea of pleading an allurement in these circumstances was wholly misconceived.

And there was even more to it than that. These logs were subject to the movement of the tidal waters. They floated when the tide was high and they sank when the tide went out. Notwithstanding the efforts of the plaintiff to impute something of the flattering powers which were once attributed to King Canute, the sawmill owner had absolutely no control over the manner in which the logs settled after the tide went out each time. Indeed it was not suggested that the sawmill workmen should have got themselves busy to ensure that the logs were properly arranged after each tidal influx so as to form a safe passage for these intruders.

Finally, defence counsel has drawn my attention to *British Railways Board* v. *Herrington*[3]. This decision of the House of Lords is the leading case on an occupier's duty of humanity to trespassers. The *ratio* of Lord Morris' judgment has been spelt out thus in the headnote:

"There is no duty on an occupier to ensure that no trespasser enters his land, nor to make his land fit for trespassers to trespass in, nor to survey his land to discover the existence of dangers of which he is not aware, since the trespasser trespasses at his peril; but, while the occupier is not under the same duty of care which he owes to a visitor, he owes the trespasser a duty to take such steps as common sense or common humanity would dictate to exclude or warn or otherwise, within reasonable and practicable limits, reduce or avert danger."

This case was approved and applied by the Supreme Court in *Lembaga Letrik Negara* v. *D. Ramakrishnan.*[4]

British Railways Board v. *Herrington*[3] was concerned with a child who was injured on a live rail. As long as it was electrified it constituted an ever present danger. Likewise in the Supreme Court case the trap was a high voltage wire which had ever present lethal consequences to anyone who came near it. The sawmill had been in operation for many years before this tragic accident occurred in November 1980. I do not doubt that when the Kampong dwellers got the chance, they surreptitiously sneaked into the sawmill bathrooms and got away with it provided they did so outside of working hours and used some discretion in the manner in which they went about it. The absence of evidence about any similar incident in the

sawmill must lead to the inference that the plaintiff's case was a rare and unfortunate exception.

Consequently I am unable to bring myself to make any adverse findings against the defendants in this case which would have the consequence of imposing some pecuniary liability upon them for the very serious injury which the plaintiff sustained in this tragic accident. Mercifully his hand has only been amputated just above the wrist and the other cases which have come up before this Court in the past few years has left me with the belief that it would not be too difficult to provide the plaintiff an artificial hand which should compensate very considerably for most of his disabilities.

The last observation which should be made about this case is that it is unfortunate that the plaintiff has been persuaded to make this claim at all when it should have been reasonably obvious that it was a non-starter. The real problem here was the penury of the kampong dwellers in this illegal settlement. Human calls of nature do not wait for Governments to function. Clean water is a birthright of every human-being as much as clean air. The Court was informed that sometime after the accident water supply has now been arranged for into this Kampong. It is a pity that it was not provided earlier. It is equally a pity that those whose duty it was to advise the plaintiff and the other Kampong dwellers who were concerned with this claim did not tell them that the plaintiff's search for justice was not in the defendant's pocket but in the other aspects of the social process.

This claim is therefore dismissed with costs.

Order accordingly.

Solicitors: *Lee & Cheah; Ong Ban Chai & Co.*

HAPPY SHOPPING PLAZA SDN. BHD. v. SUN PROPERTIES SDN. BHD. & ORS.

[O.C.J. (L.C. Vohrah J.) April 10, 1986]

[Kuala Lumpur – Originating Summons No. F. 175 of 1983]

Contract – Sale and purchase of shares – Deposit of M$1 million – Forfeiture of – Construction of sale and purchase agreement – Whether violation of s.75 of Contracts Act, 1950 – Whether forfeiture of deposit in terrorem – Contracts Act, 1950, s. 75 – R.H.C. 1980, O.5 r.4.

On May 11, 1981 the plaintiffs entered into a written agreement with the defendants for the purchase of all the shares belonging to the defendants in Loke Kee Development Sdn. Bhd. The plaintiffs paid M$1,000,000 as deposit under clause 1 of the agreement. However, the plaintiffs failed to pay the first instalment of M$4,000,000 as prescribed and the defendants' solicitors by a letter dated October 5, 1981 repudiated the agreement and forfeited the deposit. The defendants exercised their rights under clause 4 of the said agreement. The plaintiffs contended, *inter alia*, that the forfeiture of M$1,000,000 was illegal and null and void on the ground that clause 4 of the agreement was inoperative as being in contravention of section 75 of the Contracts Act, 1950 under which the defendants were only entitled to reasonable compensation for damages suffered, if any, as a result of the non-completion of the transaction. The defendant contended that the sum of M$1,000,000 was paid as a deposit and could be forfeited pursuant either to the express words "all sums thencetofore paid by the purchaser to the vendors" under clause 4 or to an implied term in the agreement.

Held: (1) the forfeiture was carried out and the agreement terminated under clause 4 of the agreement. Accordingly, it was not open to counsel for the defendants to argue that the right to forfeit could also be considered to have been an implied term in the agreement;

(2) the sum of $1,000,000 as stipulated in clause 1 of the agreement did not represent a deposit *simpliciter* but formed in fact part and parcel of a very much larger sum of $5,000,000 in another provision which was really a general forfeiture provision in the agreement *in terrorem*;

(3) this provision was thus *per se* the kind of stipulation by way of penalty envisaged by section 75 of the Contracts Act, 1950;

(4) therefore, the defendants were only entitled to obtain reasonable compensation within the limitations of this section;

(5) prayers 1 and 2 of the plaintiff's application would be allowed and reasonable compensation by way of compensation would be assessed at a later date in accordance with prayer 4.

Case referred to:

(1) *Linggi Plantations Ltd.* v. *Jagatheesan* [1972] 1 M.L.J. 89.

ORIGINATING SUMMONS.

C. V. Das (*K.S. Chang* with him) for the plaintiffs.

C. Abraham (*Y.M. Siew* with him) for the defendants.

Cur. Adv. Vult.

L.C. Vohrah J. : This is an application on the part of the plaintiff by way of an originating summons for the following prayers:

"(1) A Declaration that upon its true construction Clause 4 of the Sale Agreement dated the 11th day of May, 1981 is invalid and unenforceable as being in breach